

The ALJ found claimant suffered a compensable aggravation to his right knee and that the opinions of Dr. Jones concerning nature and extent were more persuasive in concluding the work-related aggravation of claimant's preexisting condition had produced a permanent impairment of 10 percent to the right leg. The ALJ also awarded future

medical treatment upon agreement of the parties or upon application to and a hearing before the Director.

Claimant requests review of the nature and extent of his disability. Claimant argues the ALJ erred when he reduced the award of compensation due to a preexisting functional impairment. Claimant argues that he is entitled to a 25 percent permanent partial impairment of function to the right lower extremity, based on the opinion of Dr. Jones. Claimant denies any prior problems with his right knee, and argues there is no evidence presented by respondent of a preexisting functional impairment for which any new existing impairment should be reduced.

Respondent contends the uncontroverted evidence justifies a reduction of claimant's disability award for the preexisting functional impairment to claimant's right lower extremity, arguing the Award should be affirmed.

FINDINGS OF FACT

Claimant's job title on January 26, 2011, was as a carpenter foreman for Skyline Construction. On that day, claimant walked into an unbarricaded, unlit stairwell and ran into a scaffold with all his weight bearing on his right leg. Claimant injured his right knee as the result of that accident. Claimant denies any prior problems with his right knee.

When claimant reported his right knee injury to respondent, he was sent for medical care. He first went to KU Occupational, then to Blue Valley Physical Therapy, and then to board certified orthopedic surgeon Daniel J. Stechschulte, M.D. Claimant was experiencing swelling in his knee and was having problems with squatting, kneeling, climbing ladders and stairwells. Claimant was provided physical therapy and surgery. When those did not help, he was provided a series of injections, which he testified helped a little. Claimant continues to have pain and swelling in his knee, but is able to work.

Claimant met with Dr. Stechschulte on April 28, 2011, for a consultation regarding his work-related right knee injury. Claimant complained of painless popping and catching of his right knee, and reported occasional pain, worse when walking. Dr. Stechschulte examined claimant's knee and found no warmth, erythema or effusion, with some crepitus and no ligamentous instability.¹

An MRI of the right knee on February 17, 2011, revealed findings consistent with a sprain of the lateral collateral ligament without full-thickness tear; mild popliteus tendinopathy without full-thickness tendon tear; moderate sized knee joint effusion and 1 cm loose body noted in the lateral aspect of the knee joint space; popliteal fossa cyst medially; moderate to severe degenerative change about the tibiofemoral and

¹ Stechschulte Depo. at 5.

patellofemoral joint compartments; joint space narrowing and marginal spur formation, patellar chondromalacic changes both medially and laterally; mild lateral patellar subluxation; and diminishing size of the menisci slightly without evidence of meniscal tear.

Dr. Stechschulte diagnosed right knee lateral patellar compression syndrome; right knee patellofemoral degenerative disc disease (preexisting); loose body right knee; obesity; and tobaccoism. He opined that after review of all pertinent records, radiographs, and physical examination findings, claimant's reported January 26, 2011, injury is the prevailing factor of his current right knee complaints, but not of his preexisting degenerative arthritis. His opinion was given within a reasonable degree of medical certainty.² Claimant was returned to full duty and sent for 4 weeks of physical therapy, was provided with a series of injections and eventually underwent an arthroscopy on August 31, 2011.

Claimant again met with Dr. Stechschulte on January 31, 2012. Claimant continued to have crepitus but no warmth, erythema, induration, no instability and the knee had a reasonable range of motion. Claimant reported feeling better, indicating that the injections he received for pain relief had worked. Claimant was not working at this time, but was optimistic he could find work when he was back on full duty. Dr. Stechschulte testified that claimant's joint space narrowing between the patella and femur existed prior to the accident. Claimant did not report any preexisting problems and Dr. Stechschulte testified that it is possible that claimant was not aware that he had any. Dr. Stechschulte went on to testify that trauma superimposed upon a degenerative condition can make that condition become symptomatic, and that claimant's accident certainly irritated his knee.³ Claimant was released from care.

On February 8, 2012, Dr. Stechschulte wrote a letter providing claimant's final impairment rating secondary to his January 26, 2011, right knee injury. He felt claimant had a 6 percent permanent partial impairment at the level of the right knee, based on the 4th edition of the *AMA Guides*.⁴ This rating did not include any preexisting disease or degenerative condition. Dr. Stechschulte was unaware of any AMA requirement that someone have symptoms before an impairment could be placed on them.⁵

Claimant returned to work on February 23, 2012, with Team Construction, as his job with Skyline Construction was no longer available. He worked for Team Construction for two months performing commercial carpentry and tenant finish. Claimant next worked on

² *Id.*, Resp. Ex. B at 3 (Dr. Stechschulte's Apr. 28, 2011, report).

³ *Id.* at 14.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, 4th ed.

⁵ Stechschulte Depo. at 10.

July 2012, when he went to work for Gardner Construction. At the time of the regular hearing, claimant was still working for Gardner Construction.

Claimant met with board certified orthopedic surgeon Lowry Jones, Jr., M.D., for a court ordered IME on October 11, 2012, with a chief complaint of right knee pain. Dr. Jones examined claimant and noted evidence of considerable patellofemoral crepitus in the right knee and a full range of motion when compared to the left knee which showed considerable patellofemoral crepitus. Claimant was able to squat from a standing position with complaints of knee pain. Claimant had difficulty climbing stairs and reported the left knee to be more painful.

Dr. Jones opined that claimant had primarily an aggravation of his underlying severe patellofemoral disease. He noted claimant's hyperextension injury was sharp pain associated with his patellofemoral disease process. The fact that claimant experienced pain relief with the use of Orthovisc suggested primarily bone pain. The findings were consistent with an advanced preexisting disease process. Therefore, he found claimant's current injury to be an aggravation of a preexisting disease process.⁶

Dr. Jones recommended claimant take nonsteroidal anti-inflammatory medication and limit his activity, particularly repetitive kneeling and squatting activity, for long-term care of his knee.

Dr. Jones assigned claimant a 25 percent permanent partial impairment of the lower extremity based on the significant loss of articular cartilage throughout the knee. He opined that 10 percent of this impairment was directly associated with claimant's current injury.⁷

Dr. Jones opined that because of claimant's young age he would most assuredly require additional medical treatment to include Orthovisc injections, possible future debridement, and eventually a total knee replacement. He does not believe this additional medical treatment to be directly related to claimant's injury.⁸

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

⁶ Dr. Jones IME Report (Oct. 11, 2012) at 3.

⁷ *Id.*

⁸ *Id.*

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2000 Furse 44-510e states in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁹

K.S.A. 2010 Supp. 44-501(c) states:

(c) The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Dr. Stechschulte assessed claimant a 6 percent permanent functional impairment to the right lower extremity associated with the accident on January 26, 2011. However, he qualified his rating by testifying the impairment opinion excluded any preexisting disease or degenerative condition. He had identified significant preexisting degenerative arthritis in the knee.

Dr. Jones assessed claimant a 25 percent functional impairment to the right lower extremity at the knee, but went on to limit the impairment for this injury to 10 percent of the lower extremity. He also found significant underlying severe patellofemoral disease in the right knee.

The ALJ, in determining claimant's permanent partial functional impairment in the right knee, took into consideration the preexisting degenerative process in the knee, even though claimant had testified that he suffered no preexisting pain or limitation in that knee. The only medical opinion in this record regarding the *AMA Guides* and preexisting functional impairment is that of Dr. Stechschulte who opined the *Guides* do not require symptoms before an impairment rating could be assessed.

⁹ K.S.A. 44-510e(a).

Both parties cite *Hanson*¹⁰ in support of their position. Claimant's reliance on *Hanson* is misplaced. The court in *Hanson* noted a preexisting condition is distinct from a preexisting disability. In *Hanson* the Court held there was no amount of preexisting impairment to deduct. Therefore, there was nothing for the employer and its carrier to deduct from the total impairment.

In this record there are two opinions regarding claimant's current functional impairment with the preexisting impairment being taken into consideration by both medical providers. Dr. Jones assessed claimant a 25 percent functional impairment, of which only 10 percent was for the current injury. Dr. Stechschulte assessed claimant a 6 percent functional impairment for the current injury, after excluding the preexisting disease or degenerative condition. Unlike *Hanson*, this record does contain evidence of the amount of preexisting disability or impairment. Plus, the medical record supports a determination that the *AMA Guides* do not require symptoms before an impairment can be determined.

The Board finds claimant suffered an injury on January 26, 2011, with a resulting functional impairment of 10 percent to the right lower extremity. The requirements of K.S.A. 2010 Supp. 44-501(c) have been satisfied in this instance. The Award of the ALJ is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered a permanent partial functional disability to the right lower extremity of 10 percent. Respondent has satisfied its burden of proving the level of functional impairment determined to be preexisting, pursuant to K.S.A. 2010 Supp. 44-501(c).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge William G. Belden dated February 4, 2013, is affirmed.

¹⁰ *Hanson v Logan U.S.D.* 326, 28 Kan. App. 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001).

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

BOARD MEMBER

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